

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 4, 2007 Session

**BLAKE L. KELLEY v. STATE OF TENNESSEE, DEPARTMENT  
OF CHILDREN'S SERVICES, CHILD PROTECTIVE SERVICES**

**Appeal from the Chancery Court for Davidson County  
No. 05-2452-II Carol L. McCoy, Chancellor**

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**No. M2006-02631-COA-R3-CV - Filed April 3, 2008**

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This appeal involves allegations of sexual abuse brought against Blake L. Kelly ("Respondent") by one of his former students, M.W. After the allegations were investigated, the Department of Children's Services concluded that there was substantial and material evidence to support the allegations, and the report of abuse would be "validated." The Respondent appealed that decision to an administrative law judge, who reviewed the decision, determined by a preponderance of the evidence that the Respondent had committed the acts alleged, and denied the appeal. The Respondent appealed to the Chancery Court for Davidson County, which concluded that the procedures afforded the Respondent under the Department of Children's Services' regulations failed to satisfy the Procedural Due Process Clause of the United States Constitution. The State appealed, and, after a thorough review of the facts and applicable law, we reverse the judgment of the chancery court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed**

ROBERT W. WEDEMEYER, SP. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., and ROBERT L. HOLLOWAY, SP. J., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth C. Driver, Assistant Attorney General, for the appellant, State of Tennessee, Department of Children's Services, Child Protective Services.

Blake L. Kelley, Hendersonville, Tennessee, Pro Se.

**OPINION**

**I. BACKGROUND**

In deciding this case, the trial court upheld the factual determination of the administrative judge and the Department of Children's Services Commissioner because the State presented substantial and material evidence in order to "validate" the allegations of child sexual abuse pursuant

to Tenn. Comp. R. & Regs. 0250-7-9-.02 (2005).<sup>1</sup> However, the trial court reversed the decision based on its finding that the Respondent was not afforded the protections of the Procedural Due Process Clause of the United States Constitution. The State appealed only that determination; thus, the only issue before this court is whether the trial court erred in concluding the Respondent was not afforded the protections of the Due Process Clause. Because our review is limited to this issue, we will only briefly explain the facts supporting the allegation of child sexual abuse.

The Respondent was employed as a biology teacher at Hendersonville High School during the 2002-03 school year; M.W.,<sup>2</sup> the complaining victim, was his student during this time. In addition to his regular teaching duties, the Respondent oversaw student detention, usually in the morning before school. According to M.W., she was serving morning detention on one occasion when she was asked by the Respondent to come by his classroom after school to serve detention. That afternoon, M.W. went by the Respondent's room, where she was instructed to clean chalkboards. During this time, the Respondent began discussing his sexual relationship with his girlfriend. As M.W. started to leave, the Respondent asked her for a favor, and he proceeded to explain that, although he could not touch her, she could do anything she wished to him. At that point, the Respondent attempted to pull up M.W.'s shirt and kiss her. M.W. pulled away and left the room.

M.W. also maintained that towards the end of that same school year, the Respondent sent word through another teacher that he wished M.W. would come to his room after school. M.W. did so, after which the Respondent turned off the lights and locked the door. He then proceeded to try and kiss M.W. and pull up her shirt. M.W. attempted to pull away, but the Respondent requested she stay longer. The Respondent requested oral sex, and, because M.W. felt she would not be let out of the room if she did not comply, she "ended up giving him a blow job." Afterwards, M.W. told two friends, A.H. and R.B., that she was having a sexual relationship with the Respondent. A.H. confirmed the fact that M.W. discussed with her the sexual relationship M.W. was having with the Respondent.

According to M.W., a third encounter between M.W. and the Respondent occurred towards the end of the 2002-03 school year. M.W. attended a party and became extremely intoxicated. Around 12:45 a.m., she and the Respondent began exchanging phone calls. Approximately twenty phone calls were exchanged between 12:45 and 4:29 a.m. M.W. did not recall driving to the Respondent's house, but she woke up the next morning, naked, in the Respondent's bed. The Respondent was beside her, and, as she tried to leave, the Respondent held her down and had sex with her. M.W. cried throughout the incident and told the Respondent to stop, but he refused. When the Respondent finished, he left the room. M.W. then exited the Respondent's house. When questioned about the layout of the Respondent's house, M.W. fairly accurately described it.

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<sup>1</sup>The regulations in issue have since been changed to avoid the issue associated with this case. *See* Tenn. Comp. R. & Regs. 0250-7-9-.01 to -.011 (2007).

<sup>2</sup>All minors will be referred to by their initials.

The Respondent disputed virtually all of this evidence, claiming M.W. pursued him, as evidenced by a number of handwritten notes and recorded phone messages from her. He also maintained none of the three incidents ever took place and that M.W. was never inside of his house.

Detectives found M.W.'s story to be credible based on interviews and a review of phone records. Criminal charges were not filed against the Respondent, however, because M.W. did not wish to cooperate.

Based on these facts, the Special Investigations Unit of the Department of Children's Services determined there was substantial and material evidence to support the allegations of child abuse, and it 'validated' the report pursuant to Tenn. Comp. R. & Regs. 0250-7-9-.02 (2005). According to that regulation, "A report of child abuse by the alleged perpetrator may be classified as "validated" if there is substantial and material evidence, in the light of the entire record, which indicates the individual committed physical, severe or child sexual abuse, as defined in T.C.A. §§ 37-1-102 or 37-1-602." The regulation further stated that any one of the following five factors "shall" constitute substantial and material evidence that abuse has occurred:

(1) Medical and/or psychological information from a licensed physician, medical center, or other treatment professional, that substantiates that child abuse occurred.

(2) An admission by the perpetrator,

(3) The statement of a credible witness or witnesses to the abusive act.

(4) The child victim's statement that the abuse occurred. The following elements are typical of sexually abusive situations, and should be considered in assessing the weight to be given to the child's statement in cases where sexual abuse is alleged:

(a) History of Relationship.

1. Multiple incidents occurring over a period of time. This situation is most common where the alleged perpetrator is a relative, friend, or caretaker of a victim.

2. Progression of physical touching, from activities that appear acceptable at first, but become sexual in nature.

(b) Details of Abuse.

1. Explicit knowledge of sexual activity. The victim relates explicit details of the sexual experience. This is especially relevant where the details are beyond the knowledge typical of a child of the victim's age.

2. Richness of details, such as a location and/or time, even if a specific date is not given, or other details of the environment. For a preschool age child, such detail is not expected. As a child's developmental age increases, more detail is expected.

3. Consistency. If the child is interviewed more than once, the responses and statements are generally consistent from one interview to the next. Parts of the story are corroborated by other circumstances and/or witnesses.

(c) Secrecy. The child indicates that he/she was instructed, asked, and/or threatened to keep the abuse secret.

(d) Coercion. Elements of coercion, persuasion, or threats to get the child to engage in the activity.

(5) Physiological indicators or signs of abuse, including, but not limited to, cuts, bruises, burns, or broken bones.

Tenn. Comp. R. & Regs. 0250-7-9-.02(1)-(5) (2005). The decision to “validate” the report was made because “factor” four was satisfied.

The Respondent appealed this decision to the administrative judge, who held a full hearing on the matter under Tenn. Comp. R. & Regs. 0250-7-9-.05 (2005). After hearing testimony from M.W., the Respondent, a detective, the Hendersonville High School principle, M.W.’s friend A.H., and the Respondent’s friend Christopher Clark, the administrative judge upheld the initial decision. Specifically, the administrative judge found:

The [Respondent’s] actions clearly fall within the definition of child sexual abuse as set out in T.C.A. § 37-1-602. This Administrative Judge concludes that the evidence presented by the Department meets the required burden of a preponderance of the evidence and supports the finding by the Special Investigations Unit of the Department of Children’s Services that the [Respondent] was the indicated perpetrator in a validated case of child sexual abuse involving MW.

6. Validation Factor (4) is met. MW’s testimony of the abuse was found to be credible, thus sustaining that child abuse occurred.

7. There was a preponderance of the evidence, which established that the [Respondent] committed the child sexual abuse involving MW.

Because of this decision, the administrative judge ordered:

Upon receipt of the Final Order, Investigator Jacqueline Pulliam should immediately notify any employer, volunteer organization or licensing authority previously notified of this investigation, that naming the [Respondent] as an indicated perpetrator in a validated case of child abuse has been upheld and that he is required to assure that the [Respondent] has no access to children in the course of his employment or volunteer activity as provided in State Rule 0250-7-9.09(3)(b)(2).

The Respondent appealed this decision to the Davidson County Chancery Court, which upheld the factual “substantial and material” determination of the administrative judge but concluded that the procedure outlined in the rules was an unconstitutional deprivation of his procedural due process rights. Specifically, the trial court found that the Respondent had constitutionally protected interests in his job – a property right – because he had attained tenure and in his career as a teacher – a liberty interest – because future employers would also be notified. Relying on *Brown v. State of Tennessee Department of Children’s Services*, No. E2004-01272-COA-R3-CV, 2004 WL 2715283 (Tenn. Ct. App. Sept. 23, 2004), the trial court rejected the regulation as written, finding that the process provided by the regulation was in violation of the United States Constitution. The court observed that the procedure as written required the ALJ to determine, by a preponderance of the evidence, whether the original determination was made after a finding of substantial and material evidence. Further, the regulation stated certain “factors” “shall” be considered substantial and material evidence. Finally, the court also noted, “although a ‘preponderance of the evidence’ standard is employed by the administrative law judge pursuant to Tenn R. & Reg. 1360-4-1.02(7), the ALJ is merely determining whether the very low standard of proof met in the initial investigation was really, truly met.” The court determined this extremely low burden of proof was insufficient to meet constitutional standards.

It is from this judgment that the State appeals.

## **II. DISCUSSION**

The only issue before the Court is whether the Respondent’s due process rights were violated. Tennessee Code Annotated section 4-5-322(h) provides the narrow scope of judicial review of an administrative agency:

The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.  
(B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

We are reviewing this issue under subsections (1) and (3). This is a mixed question of law and fact; therefore, we review this issue de novo. *Abdur' Rahman v. Bredesen*, 181 S.W.3d, 292, 304 (Tenn. 2005) (“A constitutional claim that is resolved after an evidentiary hearing generally presents a mixed question of law and fact. On appeal, our standard of review is de novo with a presumption of correctness extended only to the lower court’s findings of fact.” (Citations omitted)). The Fourteenth Amendment to the United States Constitution and article I, section 8 of the Tennessee Constitution are the foundations for procedural due process claims. As the Tennessee Supreme Court has held that these two provisions provide the same protection, *Riggs v. Burson*, 941 S.W.2d 44, 51 (Tenn. 1997), we generally analyze these questions under *Mathews v. Eldridge*, 424 U.S. 319 (1976).

The first issue confronting this Court, however, is whether the Respondent has an interest sufficient to invoke the protections of *Mathews v. Eldridge*. The trial court determined the Respondent had both a property interest in his job as a teacher and a liberty interest in his career. “To be entitled to procedural due process protection, a property interest must be more than a ‘unilateral expectation’ or an ‘abstract need or desire.’ It must be a ‘legitimate claim of entitlement’ to a specific benefit.” *Rowe v. Bd. of Educ. of the City of Chattanooga*, 938 S.W.2d 351, 354 (Tenn. 1996) (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). “Under Tennessee law, teachers who have been granted tenure have a constitutionally protected property interest in continued employment which can not be extinguished unless the teacher is afforded procedural due process.” *Id.* (citing T.C.A. § 49-5-511 (1996) and *Williams v. Pittard*, 604 S.W.2d 845, 849 (Tenn. 1980)). At the administrative hearing, the principle of Hendersonville High School testified that the Respondent attained tenure. Thus, he has established a legally sufficient property interest.

In addition to property interests, a legally sufficient liberty interest will suffice. The State action in this case is the dissemination of a report that the Respondent has been “validated” as a child sexual abuser. Damage to one’s reputation alone is insufficient to invoke the protections of the due process clause. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Because mere damage to reputation, or stigma, is insufficient, the “stigma-plus” test is employed to make a determination about whether a mere liberty interest rises to the level of a protected liberty interest. *Roth*, 408 U.S. at 572; *Paul*, 424 U.S. at 701; see *Valamonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994) (concluding petitioner satisfied the “stigma-plus” test when she alleged government stigmatized her as child abuser while preventing her from gaining employment in child care field). In this case the Respondent alleges damage to his reputation plus damage to his career through the dissemination of the report. As the Tennessee Supreme Court stated in *Rowe*, “The concept of liberty in Fourteenth Amendment jurisprudence includes the ‘liberty to engage in any of the common occupations of life . . . .’” *Id.* at 355 (citing *Roth*, 408 U.S. at 572). As the State rightly concedes, the Respondent has satisfied the burden of proving a legally protected liberty interest because the dissemination of the report to employers places a great stigma on him, and it will severely limit the Respondent’s ability to gain employment in his chosen profession, education. See, e.g., *Lee T.T. v. Dowling*, 664 N.E.2d 1243, 1250 (N.Y. 1996) (concluding requirement of legally protected liberty interest was satisfied by showing branding of petitioners as “child abusers” questioned their “good names” and “severely jeopardized future employment”).

We turn to the three factors in *Mathews v. Eldridge*, as the next portion of our analysis. In determining what procedural process is due the Respondent before his legally protected property and liberty interests are removed, we must consider the following factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Mathews*, 424 U.S. at 335 (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

The private interest here is significant: when the information is disseminated, Kelly will be branded a child sexual abuser, and he will be unable to practice his chosen profession. The government's interest, however, is also significant: if the information is not promptly disseminated, a "validated" child sexual abuser might be able to work around children. See *Munke v. Munke*, 882 S.W.2d 803, 806 (Tenn. Ct. App. 1994) ("The State certainly has a compelling interest in the protection and care of minors."). "[T]he prevention of child sexual abuse is a priority of this state." T.C.A. § 37-1-601 (2006).

Our analysis, thus, turns on "the risk of erroneous deprivation of such interest through the procedures used . . ." *Mathews*, 424 U.S. at 335. Again, the initial determination to "validate" the allegation is made under a low standard of proof – substantial and material evidence. Tenn. Comp. R. & Reg. 0250-7-9-.02 (2005). "Substantial and material evidence" has been described as "something less than a preponderance of the evidence, but more than a scintilla or glimmer." *Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988). As was the case here, "[t]he child victim's statement that the abuse occurred," Tenn. Comp. R. & Reg. 0250-7-9-.02(4) (2005), "shall constitute substantial and material evidence." Tenn. Comp. R. & Reg. 0250-7-9-.02 (2005). Once this determination was made, the Respondent was able to appeal the decision to an administrative law judge, but "the sole issue for the hearing officer to determine is whether the standards for classifying the report as 'validated', as provided in 0250-7-9.02 have been met in that particular case." Tenn. Comp. R. & Reg. 0250-7-9-.08(2) (2005). This Court has described this situation in *Brown v. State of Tennessee, Department of Children's Services* with the use of a hypothetical:

Let's assume, for present purposes only, that John Doe's minor stepdaughter claims he sexually molested her and criminal charges are pursued by the local district attorney. At the criminal trial, the stepdaughter testifies in detail about the molestation, and her statements about the abuse have been consistent throughout the entire process. John Doe, however, adamantly denies engaging in any improper behavior. After a lengthy and hard-fought trial, the jury concludes the State failed to prove its case beyond a reasonable doubt and John Doe is acquitted. Because of the differing burdens of proof, the criminal acquittal would not be binding on a juvenile court dependency and neglect hearing since it utilizes the lower clear and

convincing burden of proof. Undaunted by the result in the criminal trial, DCS claims in a juvenile court proceeding that the stepdaughter is dependent and neglected because she was sexually molested. After another trial, the juvenile court judge concludes that the State failed to prove the allegations of sexual abuse by clear and convincing evidence. While John Doe certainly is pleased with the outcomes of the two trials, he nevertheless is served with a summons and complaint in a civil lawsuit brought by his stepdaughter seeking compensatory damages arising from the alleged sexual assault. Because a civil lawsuit of this nature would require the stepdaughter to prove her case by the lower preponderance of the evidence standard, both the criminal acquittal and the holding of the juvenile court would not bar the civil lawsuit. A third trial now takes place, and the civil jury concludes that the stepdaughter failed to prove her case by a preponderance of the evidence and renders a verdict in favor of John Doe.

Even after the results in the three trials, DCS in good faith remains convinced that John Doe molested his stepdaughter. Although he believes his legal woes have ended having successfully defended three trials, John Doe receives a notice from DCS stating he has been indicated as the perpetrator in a validated claim of child sexual abuse. John Doe files an administrative appeal, and after a fourth trial, the ALJ concludes the previous three trials have no estoppel effect because of the differing burdens of proof. The ALJ further concludes that because the stepdaughter has been consistent from the very beginning regarding the details of the alleged sexual abuse, there is substantial and material evidence that the sexual abuse occurred pursuant validation factor number 4, Tenn. Comp. Rules & Regs 0250-7-9-.02(4). John Doe's employer is notified that he is an indicated perpetrator in a validated claim of sexual abuse and that he can no longer have access to children. John Doe's employment then is terminated.

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Indeed, there never has been any finding that [John Doe] actually committed the alleged acts; and there still is no such finding. In fact, an ALJ in this type of proceedings could find that the preponderance of the evidence weighs against a conclusion that any abuse occurred, but at the same time conclude substantial and material evidence is present. Simply because DCS, the ALJ, or even this Court finds that substantial and material evidence exists, this in no way is a determination that any abuse actually was committed.

No. E2004-01272-COA-R3-CV, 2004 WL 2715283, at \*7-8 (Tenn. Ct. App. Sept. 23, 2004) (footnote omitted).

The *Brown* Court expressed “very serious concerns” with the constitutionality of the procedures described above, but declined to find the procedures unconstitutional as the issue was not raised on appeal. *Id.* at \*8. We likewise are extremely concerned about the nature of review provided by these regulations. It is important to note, however, that the regulations were not



precisely followed in this case. Unlike the hypothetical described above, the administrative law judge affirmatively found that the Respondent committed the acts by a preponderance of the evidence, clearly going above and beyond the requirements and limitations of the regulation. *See* Tenn. Comp. R. & Reg. 0250-7-9-.08(2) (“the sole issue for the hearing officer to determine is whether the standards for classifying the report as ‘validated’, as provided in 0250-7-9.02 have been met in that particular case”).

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Additionally, “[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). Also, “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) and citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

Because the Respondent in this case received a full and fair hearing before an administrative judge where the administrative judge determined the Respondent committed the acts by a preponderance of the evidence, the risk of erroneous deprivation of rights is low. Taken as a whole, we conclude the Respondent received adequate process protection under *Mathews*. *See Lee T.T. v. Dowling*, 664 N.E.2d 1243, 1252 (N.Y. 1996) (“We conclude the Due Process Clause of the Federal Constitution requires the Department to substantiate reports of child abuse by a fair preponderance of the evidence before they may be disseminated to providers and licensing agencies as a screening device for future employment.”); *Petition of Preisendorfer*, 719 A.2d 590, 593-94 (N.H. 1998) (requiring preponderance of the evidence standard be met prior to dissemination); *Cavarretta v. Dep’t of Children & Family Servs.*, 660 N.E.2d 250, 258 (Ill. App. Ct. 1996) (same). We need not address whether the lower courts were correct in determining there was a preponderance of the evidence to support the original decision to “validate” the allegations or whether the Respondent actually committed the acts by a preponderance of the evidence as these issues were not appealed. As such, we conclude the judgment of the trial court was in error, and we reverse that judgment.

## **CONCLUSION**

Because the Respondent's constitutional rights were not violated under the Procedural Due Process Clause of the Fourteenth Amendment of the United States Constitution and article I, section 8 of the Tennessee Constitution, the judgment of the trial court is reversed.

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ROBERT W. WEDEMEYER, JUDGE